NO: 75-6842

IN THE

SUPREME COURT OF THE UNITED STATES

SPRING TERM 1976

SHERMAN EUGENE CARTER

PETITIONER

V

NORTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES SUPREME COURT

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SHERMAN EUGENE CARTER, your Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of North Carolina entered in the above entitled case on March 2, 1976, with execution being scheduled on the third Friday following the opinion, which is March 19, 1976.

OPINIONS BELOW

The opinion of the Supreme Court of the State of North Carolina is set forth below:

After trial by jury, Petitioner was found guilty and judgment entered by the Superior Court of the State of North Carolina in the Twenty-Sixth Judicial District of said State on the 1st day of April 1975 Term of Superior Court.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered March 2, 1976. The jurisdiction of this Court is invoked under 28 U.S. Code 1254(1).

QUESTIONS PRESENTED

(1) IS THE DEATH PENALTY AS SET FORTH IN THE LAWS OF THE STATE OF NORTH CAROLINA UNCONSTITUTIONAL AS SET FORTH IN NORTH CAROLINA GENERAL STATUTES 14-17, BECAUSE IT IS CRUEL AND UNUSUAL PUNISHMENT AND CONTRARY TO THE CONSTITUTION OF THE UNITED STATES?

(2) DID THE TRIAL COURT ERR IN PERMITTING DEFENDANT TO BE TRIED NOT BY A JURY OF HIS PEERS, BUT BY A JURY FROM WHICH NON-WHITES HAD BEEN SYSTEMATICALLY EXCLUDED?

STATEMENT OF THE CASE

This is an appeal from a criminal action heard at the April 1, 1975, Schedule "A" Criminal Session of the Superior Court of Mecklenburg County, North Carolina before The Honorable Lacy Thornburg, Judge Presiding, and a Jury.

The Defendant Sherman Eugene Carter and John Thomas Alford were charged in Bills of Indictment returned by the Grand Jury on February 3, 1975, with the felonious offense of murder in the first degree. Mr. Carter entered a plea of not guilty to the charge.

Pretrial motions to challenge the constitutionality of the North Carolina death penalty, for a separate trial and for a change of venue which were denied summarily by Judge Thornburg.

On November 6, 1974, two black men robbed the Viking Imports Foreign Car Parts & Accessories store in Charlotte. The men wore tobaggan hats on their heads and they immediately required the store's employees to lie down behind the counter and cover their heads. The robbers were surprised by a customer returning to the store for something he had forgotten, and one of them shot and killed the man. After taking numerous personal belongings from the employees the robbers searched in vain for a safe and ultimately left after putting the employees in the store's bathroom.

The defendant was convicted by an all-white jury. From a verdict of guilty and judgment sentencing the defendant to death, the defendant appealed directly to the Supreme Court of North Carolina.

REASONS FOR GRANTING THE WRIT

(1) DID THE TRIAL COURT ERR IN DENYING DEFENDANT CARTER'S MOTION TO CHALLENGE THE CONSTITUTIONALITY OF NORTH CAROLINA DEATH PENALTY?

Petitioner in the trial of this action raises the unconstitutionality of the death penalty as being cruel and unusal punishment. This argument was denied at both the trial level and the appeal level.

The law is settled that a party who challenges the

constitutionality of a criminal statute must have suffered injury either to his person or to his property by that statute's enforcement. Latham v. Harris, 194 N.C. 802, 803, 139 S.E. 773 (1927). A constitutional question must be presented in definite form, and aperson claiming a constitutional violation must point to the particular provision that he claims is violated. State v. Davis, 270 N.C. 1, 13, 153 S.E. 2d 749 (1967) cert. denied sub nom. Nivens v. North Carolina, 389 U.S. 828 (1967). Mr. Carter properly challenged the constitutionality of the North Carolina death penalty as set forth in N.C. Gen. Stat. Sec. 14-17, by timely motion, which specifically fulfilled the requirements stated above.

"That the requirements of due process ban cruel and unusual punishment is now settled." Furman v. Georgia, 408 U.S. 238, 241 (1972). The death penalty inflicts crue and unusual punishment in violation of the Eighth Amendment of the United States Constitution. "The terms "cruel" and "unusual" certainly include penalties that are barbaric." 408 U.S. at 244-45.

The death penalty is cruel in that it is a form of corporal punishment that is an anachronism in these times. Death by asphyxiation is certainly no less barbaric than the floggings and physical torture now considered to be dreary relics of the past. It is incongruous that the State claims the right to take lives in a manner absolutely forbidden even as a means of waging war by international treaties. It is little comfort to note that the entire process of asphyxiation lasts only several minutes, for those "few" minutes must seem a hellish eternity to the wretched victim who must endure them.

Further, the penalty is cruel and unjust in that it is levied at times upon the innocent. Although no society, if it is to maintain even a minimal level of order among its citizens, can avoid sentencing the innocent on occasion, surely that society must assume some responsibility for minimizing the consequences of such errors where it guarantees its citizens the right to life, liberty, and the pursuit of happiness.

It is unquestioned that the death penalty falls disproportionately upon the black and the poor. Furman v. Georgia, 408 U.S. 238, 250-53 (1972). The revision of G.S. sec. 14-17, through the removal of the jury's discretion in sentencing in capital cases, has not changed that fact, as a look at the socioeconomic characteristics of the current residents of North Carolina's Death Row will reveal. Mr. Carter's fate is too disturbingly typical.

It is respectfully requested that this Court declare the North Carolina death penalty as set forth in N.C. Gen. Stat. sec. 14-17 to be unconstitutional.

(2) DID THE TRIAL COURT ERR IN PERMITTING DEFENDANT TO BE TRIED NOT BY A JURY OF HIS PEERS, BUT BY A JURY FROM WHICH NON-WHITES HAD BEEN SYSTEMATICALLY EXCLUDED?

The Court has stated the general rule that the absence of blacks from a particular grand or petit jury is not, of itself, sufficient to raise any presumption of discrimination. State v. Brown, 271 N.C. 250, 256, 156 S.E. 2d 272 (1967). But, where the State's prosecutor has systematically struck blacks from the jury, it is possible that such action violates the black defendant's rights under the Fourteenth Amendment. Swain v. Alabama, 380 U.S. 202, 223 (1965).

It is most improbable that an all-white jury could have been chosen for Mr. Carter's trial without some systematic exclusion of blacks from the jury by the prosecutor's staff, in view of the sizeable black population in Mecklenburg County. To require an indigent defendant to produce complex statistical findings which illustrate a pattern of discrimination practiced by the prosecutor's office is most unrealistic, prohibitively expensive, and not in furtherance of the aims of justice.

Mr. Carter's constitutional right to due process was violated as a result of a systematic exclusion of potential black jurors. These jurors were excluded partly by a District Attorney careful

to strike from the jury any black otherwise qualified to serve, and partly by the expressed reluctance of many black jurors to vote for a conviction and would result in the imposition of the death penalty. These factors, taken together, create a jury not of Mr. Carter's peers, but a jury that was predisposed to convict him of murder on the basis of the flimsiest evidence imaginable.

CONCLUSION

On the basis of the prejudicial error shown herein, Mr. Carter respectfully requests that the judgment of the trial court be reversed and a new trial granted.

Respectfully submitted, this 17th day of May, 1976.

John G. Plumides
Attorney for Petitioner

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74Ch70366

JUDGMENT
SUPREME COURT OF NORTH CAROLINA

Spring TERM, 19 76

STATE OF NORTH CAROLINA

vs.

SHERMAN EUGENE CARTER

No. 4 Spring Cou

MAR 23 1976

This cause came on to be argued upon the transcript of the record from the Superior Court Mecklenburg Cou

upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior C

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the

Honorable DAN K. MOORE Justice, be certified to the said Superior Court, to the intent that

PROCEEDINGS BE HAD THEREIN IN SAID CAUSE ACCORDING TO LAW AS DECLARED IN SAID OPIN

and it is considered and adjudged further, that the Defendant, Sherman Eugene Carter, Do Pay

the costs of the appeal in this Court incurred, to wit, the sum

*****FORTY-TWO AND 00/100***** dollars ($ 42.00

and execution issue therefor. Certified to Superior Court this 22nd day of March 1976

TRUE COPY

ADRIAN J. NEWTON

Clerk of the Supreme Court.

By: [signature]

Deputy Clerk

STATE OF NORTH CAROLINA)
COUNTY OF MECKLENBURG)
STATE OF NORTH CAROLINA)
-vs-)
SHERMAN EUGENE CARTER,)
Defendant.)

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
DOCKET NO. 74-CR-70366

FILED
APR 9 1975
ROBERT M. BLACKBURN
CLERK OF SUPERIOR COURT
MECKLENBURG COUNTY, N. C.

75-520:278

O R D E R

In 74-CR-70366, State -vs- Sherman Eugene Carter, Defendant, the Jury having returned a verdict of guilty of murder in the first degree, and the law fixing the punishment for this crime as death, it is the Judgment of the Court that the defendant, Sherman Eugene Carter, be remanded to the common jail of Mecklenburg County and from there be forthwith conveyed to the State Penitentiary at Raleigh in the State of North Carolina, by deputies to be assigned for this purpose, and by them delivered to the warden of said penitentiary.

It is further CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant, Sherman Eugene Carter, shall remain in the custody of said warden until Monday, September 29, 1975, and on that date between the hours of 8:00 o'clock in the forenoon and 5:00 o'clock in the afternoon said defendant shall be taken by said warden to the place of execution in said penitentiary; and it is further CONSIDERED, ORDERED AND ADJUDGED by the Court that said warden shall then and there cause the defendant to inhale lethal gas of sufficient quantity to cause death, and said administration of lethal gas shall continue until the defendant is dead.

DONE IN OPEN COURT, This the 9th day of April, 1975.

JUDGE PRESIDING

File # 74 CR 70366

Film # 75-520-276

STATE OF NORTH CAROLINA

County of Mecklenburg

In The General Court of Justice

Superior Court Division

The State of North Carolina

vs.

JUDGMENT AND COMMITMENT

Sherman Eugene Carter 18 Male Negro

Name, Age, Sex and Race of Defendant

In open court, the defendant appeared for trial upon the charge ~~XXXXXXX~~ of Murder 1st degree

and thereupon entered a plea of Not Guilty to said charge.

The Jury
Having found the defendant charged guilty of the offense of Murder 1st degree as

which is a violation of G. S. 14-17 and of the grade of Felony

It is ADJUDGED that the defendant be imprisoned for the term of

in the

Judgment attached

It is ORDERED that the Clerk deliver two certified copies of this judgment and Commitment to the Sheriff or other qualified officer and that said officer cause the defendant to be delivered, with such copies as commitment authority, to the appropriate official of the State Department of Correction.

This 9th day of April, 1975.

Presiding Judge

Attorney for Defendant: John G. Plumides

Attorney for the State: Peter L. Gilchrist, III

Date certified copies of judgment delivered to Sheriff for commitment: 4-10-75

AOC-L FORM 133

APPEAL ENTRIES

In apt time, the defendant objects and excepts to the rulings and judgment of the Court and gives notice of appeal to the North Carolina Supreme Court

Further notice waived.

The defendant is allowed 60 days to prepare and serve case on appeal, and the State is allowed 25 days after such service to prepare and serve countercase.

Appearance bond is fixed in the sum of $ None Allowed

Appeal bond is set at $

This 9th day of April , 19 75

Presiding Judge

CERTIFICATION TO DEPARTMENT OF CORRECTION

I certify that this document is a true and complete copy of the original Judgment and Commitment in the case named, now on file in this office, and that this copy is certified to the North Carolina State Department of Correction, as in said judgment directed, as authority for the execution of the prison sentence therein imposed.

Witness my hand and the seal of the Superior Court.

This 10 day of April , 1975.

Deputy Clerk of the Superior Court

NO. 4 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1976

75-6842

STATE OF NORTH CAROLINA

v. From Mecklenburg

Sherman Eugene Carter

* *

ORDER FOR STAY OF EXECUTION

* *

Petition having been filed by defendant above named, through his attorney, John G. Plumides of Charlotte, North Carolina, for a stay of execution of the judgment and death sentence rendered upon a conviction of first degree murder by the Honorable Lacy Thornburg at the April 1, 1975, Schedule "A" criminal session of Mecklenburg County Superior Court, which judgment upon appeal was affirmed by the Supreme Court of North Carolina in its opinion filed March 2, 1976, and execution being scheduled on the third Friday following the filing of the opinion, which is March 19, 1976, and the defendant, through his attorney, having stated his intention to file a petition for writ of certiorari in the United States Supreme Court;

NOW, THEREFORE, it is ordered that the execution of the judgment be and the same is hereby stayed pending further orders of this court.

It is further ordered that the defendant remain in the custody of the Director of the Department of Correction pending further orders of this court.

It is further ordered that the defendant file his petition for certiorari with the Supreme Court of the United States within 90 days from and after March 2, 1976. Upon filing his petition for writ of certiorari with the Supreme Court of the United States, defendant shall file proof of such filing with the Clerk of the Supreme Court of North Carolina.

It is further ordered that a certified copy of this order be served on the Warden of Central Prison, Raleigh, N. C.

This the 11 day of March 1976.

CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA.

I hereby accept service of copy of the attached order of stay of execution for and on behalf of the Warden of Central Prison.

This 18th day of March 1976.

R. C. Lovette Supt.

cc: Mr. John G. Plumides, Attorney at Law
The Honorable James E. Holshouser, Jr.
Mr. Jacob Safron

A TRUE COPY
ADRIAN J. NEWTON
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA
BY Mrs. Peggy M. Boyce
ASST. CLERK
18 March 19 76

IN THE

SUPREME COURT OF THE UNITED STATES

Spring Term 1976

NO. 75-682

SHERMAN EUGENE CARTER,
Petitioner

v.

STATE OF NORTH CAROLINA
Respondent.

ON WRIT OF CERTIORARI
TO THE
SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE RESPONDENT in opposit.

THOMAS B. WOOD
Attorney for Respondent
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 829-4185

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IN THE

SUPREME COURT OF THE UNITED STATES

Spring Term 1976

SHERMAN EUGENE CARTER,
Petitioner

v.

STATE OF NORTH CAROLINA,
Respondent.

ON WRIT OF CERTIORARI
TO THE
SUPREME COURT OF NORTH CAROLINA

RESPONSE OF RESPONDENT,
STATE OF NORTH CAROLINA,
IN OPPOSION TO
PETITION FOR WRIT OF CERTIORARI

CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 289 NC 372, _____ S.E. 2nd _____ (1976).

JURISDICTION

Petitoner seeks to invoke the jurisdiction of this Court pursuant to 28 USCA 1257(3).

QUESTIONS PRESENTED

I. Is the death penalty set forth in the laws of the State of North Carolina unconstitutional as set forth in North Carolina General Statute 14-17, because it is cruel and unusual punishment and contrary to the Constitution of the United States?

II. Did the trial court err in permitting the defendant to be tried, not by jury of his peers, but by a jury from which non-whites had been systematically excluded?

STATEMENT OF CASE

The petitioner has filed with this court a Petition for a Writ of Certiorari to review the judgment of the Supreme Court of North Carolina in denying the defendant's Petition for Certiorari to review the trial court's alleged error in permitting the defendant to be tried by a jury from which non-whites had allegedly been systematically excluded. The petitioner has, also, requested this court to review the imposition of the sentence of death imposed upon him under North Carolina General Statute 14-17 for murder in the first degree.

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT CARTER'S MOTION TO CHALLENGE THE CONSTITUTIONALITY OF NORTH CAROLINA'S DEATH PENALTY.

The petitioner asserts that the penalty of death is cruel and unusual punishment. He also urges that the revision of G.S. 14-17, through the removal of the jury's discretion in sentencing in capital cases, has not changed the cruel and unusual character of the death penalty as being violative of

the Eighth and Fourteenth Amendments to the Constitution of the United States.

This court has received briefs and heard oral arguments on this question as raised by the petitioner in the case of *State v. Woodson and Waxton*, No. 75-5491, 1976 Term. The petitioner's question, therefore, has, in essence, been accepted for hearing by this court. Therefore, any decision in this case concerning the cruel and unusual character of the death penalty should be dependant upon the outcome of the *Woodson* case, and the petition to grant certiorari in the present case should be denied.

II

THE TRIAL COURT DID NOT ERR IN PERMITTING THE DEFENDANT TO BE TRIED BY AN ALL-WHITE JURY.

The defendants hereunder present an insubstantial argument to the effect that the all-white jury in Mecklenburg County that tried these black defendants was constituted through systematic exclusion of blacks from the jury by the prosecutor's staff. This contention, of course, is based upon the premise that such jury panel, based on population ratios, would contain blacks had such systematic exclusion not occurred.

This argument has been repeatedly answered by the Supreme Court of North Carolina. Particularly would such argument contain no merit in the absence of the defendants proving affirmative acts of exclusion rather than their showing only population ratios as to race. In the recent case of *State v. Cornell*, 281 NC 20 at page 32 the Supreme Court of North Carolina made these observations:

> "(3) A person has no right to be indicted or tried by a jury of his own race or even to have a representative of his race on the jury. He does have the constitutional right to be tried by a jury from which members of his own race have not been systematically and arbitrarily excluded.

State v. Yoes, 271 NC 616, 157 SE 2d 386; *State v. Wilson*, 262 NC 419, 137 SE 2d 109; *Swain v. Alabama*, 380 US 202, 85 S.Ct. 824, 13 L.Ed. 2d 759; *Gibson v Mississippi*, 162 US 565, 16 S.Ct. 904, 40 L.Ed. 1075....In instant case defendants contend that their showing that the black adult population in Forsyth County amounted to approximately 20% of the population of that County, when coupled with the testimony of the witness Foltz to the effect that during the biennum beginning January 1970 approximately 10% of the petit jurors appearing for service in the courtroom in which he was employed were Negro, made out a prima facie case of racial discrimination... The case of *Swain v. Alabama*, supra, strongly supports the State's argument... the United States Supreme Court held that the trial court properly denied defendant's motion to quash. Mr. Justice White delivered the Court's majority opinion, and Mr. Justice Goldberg, with whom Chief Justice Warren and Mr. Justice Douglas joined, delivered a separate dissenting opinion. The majority opinion, in part, stated:

'...We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%. See *Thomas v. Texas*, 212 US 278, 283, 53 L.Ed. 512, 514, 29 S.Ct. 393; *Akins v. Texas*; 325 US 398, 89 L.Ed. 1692, 65 S.Ct. 1276; *Cassell v. Texas*, 339 US 282, 94 L.Ed. 839, 70 S.Ct. 629...There is no evidence that the commissioners applied different standards of qualifications to the Negro community than they did to the white community. Nor was there any meaningful attempt to demonstrate that the same proportion of Negroes qualified under the standards being administered by the commissioners. It is not clear from the record that the commissioners even knew how many Negroes were in their respective areas, or on the

> jury roll or on the venires drawn from the jury box. The overall percentage disparity has been small, and reflects no studied attempt to include or exclude a specified number of Negroes.... We do not think that the burden of proof was carried by petitioner in this case.' *Swain v. Alabama*, supra, amply supports a holding under the facts of this case that the showing of underrepresentation of Negroes on the juries of Forsyth County was not sufficient to establish a prima facie case of racial discrimination."

A very definitive statement on this subject and directly in point with regard to the case at hand was made by this Court in the case of *State v. Yoes*, and *Hale v. State* reported at 271 NC 616 at page 632:

> "It is not required that the Negro race be represented on a jury panel in the same ratio to the toal membership as the Negro population of the County bears to the total population. *State v. Lowry* and *State v. Mallory*, 263 NC 536, 139 SE 2d 870; *State v. Wilson*, 262 NC 419, 137 SE 2d 109; *State v. Miller*, 237 NC 29, 74 SE 2d 513; 24 Am. Jur., *Grand Jury*, Sec. 27; 38 C.J.S., *Grand Juries*, Sec. 12. 'It is not the right of any party... to be tried (or indicted) by a jury of his own race, or to have a representative of any particular race on the jury. It is his right to be tried by a competent jury from which members of his race have not been unlawfully excluded.' Stacy, C.J. speaking for the Court in *State v. Koritz*, 227 NC 552, 43 SE 2d 77. To the same effect, see: *State v. Wilson*, supra; *State v. Miller*, supra; *State v. Speller*, 231 NC 549, 57 SE 2d 759; and *Thiel v. Southern Pacific Company*, 228 US 217, 90 L.Ed. 1181."

CONCLUSION

It is therefore respectfully submitted that the questions concerning the alleged systematic exclusion of non-whites from the defendant's jury has not been shown by the defendant nor has it been held by the Supreme Court of the United States that such a jury composition does establish a *prima facie* case of racial discrimination. The State would also contend that, inasmuch as the question of the constitutionality of the death penalty is already before this Court, the petitioner's *Petition For Writ of Certiorari* upon the cruel and unusual aspects of the death penalty should also be denied.

Respectfully submitted,

RUFUS L. EDMISTEN
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